(17,759.)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 279.

S. A. AND S. C. HASELTINE, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL NATIONAL BANK OF SPRINGFIELD, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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STATEMENT OF CASE.

This is a suit under the National Banking Act, for the statutory penalty for knowingly *charging* and *receiving* usurious interest in violation of the *second clause* of section 5198 of the revised Statutes of the United States, Second Ed., 1878, p. 1005.

The petition contains several counts, aggregating $831.70, being double the amount of ususurious interest paid by the plaintiff to defendant bank at several renewals of the note.

The facts as found by the referee, Hon. C. W. Hamlin, are as follows, to-wit: That within two years next before filing the petition plaintiff had paid $415.85 *in cash* to the defendant Bank at the several renewals of a note of $2240, which was admitted by the defendant and found by the referee to be in excess of 8 per cent., the legal rate of interest in Missouri.

That no exceptions were filed by either party to the referee's report, and judgment was rendered for plaintiff for twice the said sum, or $831.70.

From this judgment the defendant Bank appealed to the Supreme Court of Missouri, which reversed the Circuit Court's decision, and the case is brought here on writ of error.

The only point made by the defendant Bank is that the principal debt was not paid at the bringing of the suit, and the decision of the Supreme Court of Missouri makes this payment of the principal debt a condition precedent to plaintiffs suit to recover under this statute.

ASSIGNMENT OF ERROR AND PRAYER FOR REVERSAL.

Now come appellants in error and state to your honor that errors have been committed by the supreme court of Missouri against the rights of your appellants in the decision against appellants, in this:

I.

Appellants were entitled to the rights they claim in this petition under section 5198 of the Revised Statutes of the United States in 1878, which is denied by the decision in this case by the supreme court of Missouri.

II.

Also said decision of the supreme court of Missouri denies to appellants their claim under the laws of the United States as construed by the Supreme Court of the United States in care of Brown vs. Marion National Bank, 169 U. S., 416.

III.

The supreme court of Missouri denies the rights to the appellants under the United States statute, section 5198, as construed by every court of last resort in the United States, some of which are:

See Nebraska First National Bank vs. Smith, 54 N. W. Rep. 254

See in Pennsylvania, A. Brown vs. Second National Bank, 72 Pa., 209.

See in New Jersey, National Bank vs. Carpenter, 19 Atlantic Rep., 181.

See in West Virginia, Lynch vs. Bank, 2 W. Va., 994.

See in Kentucky, Henderson National Bank vs. Alver, 15 S. W., 132.

See in Texas, Stout vs. Ennis National Bank, 69 Texas, 384, 8 S. W. Rep., 808.

See in Nebraska, Exeter National Bank vs. Orchard, 61 N. W. Rep., 833.

4 See in Pennsylvania, Lebanon National Bank vs. Karmany, 98 Pa. St. 65.

Also U. S. Supreme Court, Brown vs. Marion National Bank, 169 U. S., 416.

BRIEF.

This suit is brought under the second clause of section 5198 of the Revised Statutes of the United States for 1878, which reads as follows, to-wit:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an *action of debt, twice the amount* of the *interest* thus paid, from the association taking or receiving the same, provided *such action* is commenced *within two years* from the time the *usurious transaction occurred.*

There were eight usurious transactions. The bank demanded and received usurious interest eight times, each constituting a violation of the act of congress prohibiting usury referred to above. The action is for a penalty, not for the principal debt. There is no allusion to it in the law or petition. That is not required to be paid before suit is brought. The language of the statute is "in case the greater rate of interest *has been paid*, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt twice the amount of the interest *thus paid*, from the association taking or receiving the same. Provided such action is commenced within two years from the time the usurious transactions occurred."

The penalty imposed must be sued for within two years after the illegal interest is paid, or the suit will be barred.

The court below bases its decision on the sole ground that the principal debt has not been paid, thereby creating a condition not provided for by the statute. The principal debt was not due, and plaintiffs were not required to pay it till due By exercising their legal rights in not paying until mature, their cause of action under the construction would have been barred, if the ruling of that court was correct. It has attempted to add a condition to the provisions of the statute not contained in it and to deny to plaintiffs the ex-

ercise of the rights granted to them by the statutes.

If the ruling of the court below is correct those who commit crimes of this sort can avoid the penalty by refusing to receive payment of the debt until the limitations have run; or may transfer such securities until the action is barred and by so doing defeat the operation of the law in question.

This question has been under consideration in the highest court of a number of the states and they have uniformly held that the right to recover doesn't depend upon the payment of the principle.

In Bank vs. Orchard, 61 N. W., Reports 833, the court said:

"We know of nothing in the act of congress which by any reasonable construction could be held to imply that a party's right of action against a National Bank, to recover twice the amount of usurious interest paid the bank for the use of a loan of money made to him by the bank, depends on his first paying the principal of the usurious loan, nor have we been cited to, or been able to find, any decision, *of any court* which so held."

In Stout et al vs. Ennis Natio al Bank, 69 Texas, 384 same case 8 S. W. Rep. 808, the Supreme Court of Texas says, "The appellee insists that the right to the penalty (under U. S. Statute) could not attach until the entire debt was paid, * * * "When, however, the parties as they did in this case, appropriate and intend to appropriate the payment to the usurious interest, the *locus penitentiae* can no longer exist, for the offense has been consummated" "The *greater rate of interest has been paid*, the right to the penalty is fixed." "The interest contracted for being usurious, the *Act of Congress* declared it all forfeited, and there was no legal claim for interest on which the payments could have been appropriated, the right to the penalty attached." The above is squarely the case at bar.

In Pennsylvania Supreme Court in the case of Lebanon National Bank vs. Karmany 98 Pa. St. 65. (See 8 clause of Silibus Page 66.) "Suit may be brought for the penalty by the person paying the usurious interest at any time after the said payment, even

though the indebtedness on which the usurious interest was paid has *not been discharged*."

"It is alleged that the Court erred in refusing the defendants points that no recovery can be had for the penalty under section 5198, unless the debt was also paid." After stating the Statute the Court, top of page 75, says:

"Two categories are thus defined and the consequences denounced.

1. Where illegal interests have been knowingly stipulated for but not paid, there only the sum, but without interest, can be recovered.

2 Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending Bank, brought by the person paying the same or their legal representatives."

Bennett vs. National Bank, 8 Otto, 555.

"The terms of the Statute are too plain for different constructions. If illegal interest be contracted for, the debt shall bear no interest. If such interest be paid, the offending Bank is liable in an action for twice the amount. That liability is incurred the *moment* the *Bank* receives the illegal interest. The intendment is to prevent Bankers contracting or receiving more than lawful interest for the use of money."

"To permit a Bank which had actually received illegal interest, when sued for the penalty, to chop round and call it a credit, the principal would violate the vindicatory clause of the Statute. In such case the taking would amount to nothing more than a contracting to receive. The Statute inflicts twice the penalty for taking that it does for contracting."

Monongahala National Bank vs. Orchard 38 Leg. Intell., 185.

On same page, 75, the Court, in speaking of State Statutes, says:

"Such Statutes and decisions under them throw no light on the question now pending."

"This case clearly shows that the reference to the former decisions of Missouri under State statutes, the common law, or equity are not applicable to a case under this U. S. Banking Act

Brown vs. Marion National Bank, 169 U. S. 416. 18 vol. Nat. Rep. U. S. Supreme Ct. 390.

The U. S. Supreme Court, after quoting Sec. 5198 U. S. Statutes, says :

"The last section clearly makes a difference between interest which a note, bill or other evidence of debt, held by a National Bank "*carries with it*, or which has been agreed to be paid thereon" and interest which *has been* "*paid.*"

And further says:—"Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that as we have said *was not payment* within the meaning of the statute."

"We think the statute cannot be so construed. If within the meaning of the statute interest is (*paid*) simply by including it in a renewal note, it WOULD FOLLOW that as soon as the *usurious interest* is included in the *renewal note*, the *borrower* or obligor could sue the *lender* or obligee and recover back *twice* the amount of the interest thus paid when he HAD NOT in fact PAID THE DEBT, nor ANY PART OF THE INTEREST AS SUCH."

"This cannot be a sound interpretation of the statute. The words, in case the GREATER RATE OF INTEREST HAS BEEN PAID in section 5198, refer to INTEREST ACTUALLY PAID, as distinguished from INTEREST INCLUDED IN THE NOTE and only (agreed to be paid.")

"If at any time the obligor ACTUALLY PAYS USURIOUS INTEREST, AS SUCH the usurious transaction MUST BE HELD to have then—and not before, occurred, and he MUST SUE WITHIN TWO YEARS THERE AFTER."

This Brown decision by this U. S. Supreme Court, is squarely in point against the Bank in the case at bar.

It also shows the error of the Bank counsel in taking the posi-

tion which they did in their briefs, and which the Missouri Supreme Court adopted to the effect that "McBroom had paid usurious interest," etc. Hence the error and the necessity of this appeal.

This Court squarely holds in the case of Brown vs. National Bank 169, U. S. 416: "If the obligor *actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred.* and he must sue within two years thereafter" This is appellants plaintiffs position. Can it be stated plainer. *We paid the usurious interest as such.* The note was renewed from time to time, by executing new notes for the same principal debt, the interest having been paid in cash at each renewal. Then each payment was a separate usurious transaction. The U. S. statute says, and this court here so holds. And all the supreme courts of the several states so hold. The Missouri supreme court is therefore in error. And their decision should be reversed, by this court in the case at bar.

In the Court of Appeals in Kentucky, on June 22, 1891, construing this U. S. Statute, second clause, Sec 5198, says:

"We also think that the limitation of two years prescribed by the statute, within which an action may be commenced, begin to run, in the language of the statute, 'from the time the usurious transaction occurred," which appear to have been in each instance mentioned in the appellant's petition or the dates, *and not times of payment*, of the several notes"

The Statutes of Missouri and decisions under them referred to by the Supreme Court of Missouri, upon the subject of usury and the decision under the common law and equity suits "may be laid out of view They cannot effect the case," as decided by this court in Barrett et. al, vs. National Bank, 91 U. S., 555. There under said decision by this court it is held :

'Two categories are thus defined and the consequences denounced."

1 "Where illegal interest has been knowingly stipulated for, *but not paid*, there only the sum, but without interest, can be recovered"

2. "Where such illegal interest *has been paid*, then twice the amount so paid can be recovered *in a final action of debt*, or suit in the nature of such action against the offending Bank, brought by the person paying the same, or their legal representative."

"The statutes of Ohio and Indiana upon the subject of usury may be laid out of view, they cannot affect the case." x x x "The prosecution shall be a suit *brought specially and exclusively for that purpose*. where the *sole* issue is the guilt or innocence of the accused without the presence of any extraneous facts which might confuse the jury to the prejudice of *either party*."

Therefore under the decision of this court, in 91 U. S., 555. the question of payment of the principal debt under this statute in regard to usury, cannot be raised.

In Farmers and Mechanics National Bank vs. P. C. Deering, 91 U. S., Rep. 29, in speaking of the law under consideration, your honors said:

"In any view that can be taken of the 30th Section the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion."

"The 30th Section is remedial as well as penal, and it is to be liberally construed to effect the object which congress had in view in enacting it." Gray vs Bennett, 3 Met., 522-529."

"The 46th Section of the Banking act of Feb. 25th, 1863, 12 Stat. at L. 679, declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of the debt or demand."

"In the act of 1864, 13 Stat., at L. 108, the forfeiture of the debt is omitted and there is substituted for it the forfeiture of the interest stipulated for if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid."

"This section has been elaborately considered by the highest court of Massachusetts, of Pennsylvania, of Ohio and Indiana, etc."

In this court in Stephens vs. Monongahala National Bank, 111 U. S., 197, is stated again the difference between interest contracted and *interest paid*. Referring to Bennett vs Bank 98 U. S. 555, it says: "The ground of that decision was that *without the statute* there could be no recovery from the Bank for usurious interest so *actually paid*, the Statute which created the right to such recovery also prescribed the remedy. That remedy was *exclusive* of all others for the enforcement of that right. Bank vs. Deering 91 U. S. 29."

How can these decisions be harmonized with the Missouri decision in the case at bar? That other conditions not in that Statute which alone governs must be first complied with, (to-wit: the payment of a principal debt to a Bank not now in existance, hence plaintiff could not sue as the Statute does not provide a suit against a bank's former stockholder or officer.) The case at bar where the Central National Bank no longer exists, is a good reason for the rule that the payment of the principal does not affect the plaintiff's rights where usurious interest is actually paid and received.

This court, in Carter vs Carusti 112 U. S., 478, under District of Columbia, Statute, says, "This is not a suit to recover back usurious interest paid, but to enforce the collection of the note upon which it is contended that usurious interest was received. The plaintiff in error did not pay the unlawful interest but it was paid by Daniels, and it was paid by him more than a year (two years in U. S. Stat.) before this suit was brought, and more than a year before the defense set up by the plaintiff in error. If Daniels himself who paid the alledged usurious interest, had brought a suit to recover it back, his action would have failed, *because not begun within the time provided by the Statute.*"

This case shows that the *time* for bringing the suit has no reference to the payment of the principal. But from the plain language of the Statute which prescribes the penalty, the separate suit must be brought within the limit of two years from the payment of the usury.

In Scotch Mortgage Company vs. McBroom, decided in the supreme court of New Mexico, it will be seen in 30 Pacific Reporter, 859, see page 861, that McBroom gave his note for $65,000, but only took with him $58 500.

That $6,500 was reserved or deducted from the note—not actually paid, as in the case of plaintiffs renewals, where plaintiffs note remained the same. Plaintiff paid cash to get it extended from time to time.

The New Mexico statute differed from the United States statute, section 5198, in not *forfeiting the legal interest*, but only the excess, Hence McBroom had paid no excess, hence no usury.

The facts are different, and the law is decided to be different by all the courts, save and except the mistake in the case at bar. Should you not reverse it?

So Brown vs. Marion National Bank, 169 U. S., 416, says:

"If the note when sued on includes usurious interest or interest upon usurious interest agreed to be paid, the holder in due time may elect to remit such interest, and it cannot then be said that usurious interest was paid to him. McBroom against Investment Co., 153 U S., 318."

"If at any time the obligee actually pays usurious interest *as such*, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter."

Thus the McBroom case is clearly distinguished from the case at bar

The rule is thus well stated by the supreme court of Massachusetts in the case of Stevens vs. Lincoln, 7 Metcalf, 528:

"While the usurious interest remains unpaid there remains the *locus penitentiae*. Where, however, the parties, as they did in this case, appropriate the payment of usurious interest *locus penitentia* can no longer exist, for the offense has been consummated, the greater rate of interest has been paid, and the right to the penalty fixed."

The supreme court of Nebraska in the 54 N. W. Rep., 254, case of First Nat. Bank vs. Smith, says:

"The question presented involves the true interpretation of the proviso clause of section 5198 of the Revised Statutes of the United States"

"It does not refer to the time the contract is entered into, nor is it the payment of the principal sum borrowed which gives the right to sue for the penalty. The receipt of the illegal interest is the foundation of the borrower's right to recover the penalty, and the actual payment of the interest in excess of the legal rate is the usurious transaction referred to in the section."

"The period of limitation begins to run from the time the cause of action accrues."

"If the interpretation for which plaintiffs (appellants) contend should be adopted, then it would follow that a suit to recover the penalty for the taking of usurious interest by a national bank cannot be maintained until the loan is fully paid off."

"Stated differently, one who has paid large sums as illegal interest on a loan and is unable to pay the entire debt is not entitled to the benefit of the section."

"Such was not the intention of Congress, nor is it the fair and reasonable import of the language of the section."

"The right to maintain the action to recover the penalty prescribed by said section 5198 accrues as soon as the unlawful interest is paid, and the two years' limitations begin to run from the time such payment was made." And cites a number of cases.

Brown vs. Second National Bank, 72 Pa. St., 209, Judge Sharswood, for the supreme court of Pennsylvania, in 1872, in construing section 5198, United States statutes, says:

"It is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury and from which the limitation of the action for the penalty commences to run."

By the court of errors of New Jersey in National Bank vs. Carpenter, 19 Atlantic Reporter, 131; construing section 5198, United States statutes: "The statute of limitation begins to run from the time the interest is paid."

In Henderson vs. Second National Bank, Kentucky supreme court, 1891, 15. S. W. Rep., 1321, says:

"United States statute, section 5198, gives a right within two years, and: "The date runs from the usurious transaction and not from payment of the note."

Same, Lynch vs. Bank, 22 W. Va., 554.

Say "the statute of limitations is two years from the payment of interest."

"Each payment of illegal interest must be regarded as a transaction, within the intent of the statute; and when the payment is made or actually occurs the two years' limitation begins to run, as to that payment, from that time, and so on each successive payment or renewal of the same loan."

Therefore, under the plain language of the statute; under all the decisions construing the same; under all the reasons and intendment of the law, we most sincerely believe that the case at bar should be reversed and the decision of the Circuit Court affirmed.

Very Respectfully,

JAMES BAKER,

Attorney for Appellants.